Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1449

CARL L. HARVEY, *Petitioner*

vs

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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vs

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Carl L. Harvey, hereby respectfully petitions the Supreme Court of the United States to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 11, 1975, and the Court's denial, on April 25, 1975, of petitioner's application for rehearing.

OPINION BELOW

Pursuant to Rule 28 of the Rules of the United States Court of Appeals for the Seventh Circuit, the opinion of the Court of Appeals will not be published. The opinion is included in the appendix to this petition.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Seventh Circuit sought to be reviewed was entered on April 11, 1975. A timely Petition for Rehearing was filed by the Petitioner, but denied by the Court of Appeals on April 25, 1975. This petition for writ of certiorari is thus filed within thirty (30) days after the Court of Appeals' last mentioned action of April 25, 1975. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by Title 28 U.S.C. Section 1254(1).

QUESTION PRESENTED FOR REVIEW

This Petition presents the following question for review:

Whether the petitioner was denied due process of law under the Fifth Amendment when his conviction was based upon the bare minimums of contradicted, uncorroborated evidence of an unindicted accomplice, whose testimony could have been corroborated, if it was true, resulting in an inconsistent verdict.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

This case involves the Fifth Amendment to the Constitution of the United States. The text of said provision is set forth in the Appendix to this petition.

STATEMENT OF THE CASE

The petitioner, Carl L. Harvey, was indicted by the Grand Jury for the Eastern District of Illinois in a Five-count indictment. The trial proceeded on four (4) counts, with Count II being severed.

Count I charged that Harvey, along with Mark Crawford, did, and did aid and abet, in concealing, storing, bartering, selling and disposing of $5,000 or more of stolen property which moved in interstate commerce in violation of 18 U.S.C., Sections 2314 and 2.

Count III charged Carl L. Harvey of interstate transportation of a stolen Iver Johnson revolver in violation of 18 U.S.C., Section 922(i).

Count IV charged that Harvey and Crawford knowingly did conceal, store, barter, sell and dispose of a stolen Browning shotgun moving in interstate commerce in violation of 18 U.S.C., Sections 922(j) and 2.

Count V charged Harvey and Crawford with conspiracy to violate 18 U.S.C., Section 2315 in violation of 18 U.S.C., Section 371.

The jury found petitioner, Carl L. Harvey, guilty on Counts I and IV, and not guilty on Counts III and V. The record before the Court shows that on March 2, 1973, sixty-eight (68) guns were taken from Charles Rutter's Hardware Store in Carmi, Illinois, in a burglary (Tr. 14-15). Later Marcus Crawford purchased some of these guns from Harold Dean Martin (Tr. 56) and sold them to Gary Short. (Tr. 88). Gary Short heard that the guns were stolen and turned them over to the Sheriff. (Tr. 102).

Harold Dean Martin testified that he bought the guns from Carl L. Harvey (Tr. 43) in that he and Harvey went from Carmi, Illinois, to a house near Griffin, Indiana (Tr. 47), and picked the guns up from the owner of the house who Harvey gave a check for Fifty Dollars ($50.00) and drove them back to Carmi, Illi-

nois; (Tr. 51), that he kept three (3) guns (Tr 51) and sold the remainder to Crawford for Two Thousand Dollars ($2,000.00) and the title to a 1966 GTO; (Tr. 56), that he gave Harvey One Thousand Eight Hundred Dollars ($1,800.00) for the guns. (Tr. 57).

Richard Lee Earl testified that he sold the guns to Martin, (Tr. 121, 123), and that he purchased them from a man by the name of Leroy, who drove a white Cadillac from Evansville, Indiana. (Tr. 124).

The Government did not produce the owner of the farm house near Griffin, Indiana, nor the Fifty Dollar ($50.00) check given to him, nor Alvin Nichols, nor did the Government give any explanation why this evidence was no produced.

ARGUMENT

The Court of Appeals has decided an important question of constitutional law which has not been, but should be, settled by this Court concerning the cumulative effect of minimal standards of a fair trial with in the meaning of "Due Process of Law."

The jury's verdict as to the Defendant's guilt, rests solely on the testimony of Harold Dean Martin, which if believed, makes Martin an unindicted accessory. Martin's testimony was denied by the Defendant and contradicted by Richard Lee Earl. Such evidence is a bare minimum, though sufficient under due process if it generates a belief beyond a reasonable doubt. *United States vs. Burch*, 471 F.2d 1314, 1317 (1973).

Harold Dean Martin testified that he and the Defendant obtained the guns from the owner of a farm near Griffin, Indiana, and that the Defendant gave the owner a check for Fifty Dollars ($50.00). The Government did not call the owner as a witness nor did it produce the check, nor was there any explanation as to why this evidence was not produced. While the Government is not required to produce all the evidence; *United States vs. Rizzo*, 416 F.2d 734 (1969), the failure of the Government, under the circumstances disclosed, to call these witnesses justifies, if it does not compel, the inference that their testimony would have been against the Government. *Wesson vs. United States*, 172 F2d. 931, 936 (1949). Thus, the failure to produce such evidence is at most another bare minimum, under due process, to support the conviction.

The jury found the Defendant guilty on Counts I and IV, and not guilty on Counts III and IV. The evidence on each count was identical. The verdict was inconsistent. This Court has held that such inconsistency is not defective. *Hamling vs. United States*, 418 U.S. 87; 94 S.Ct. 2887, (1974); however, the contrary is true in civil law. *Barnes vs. West Point Foundry and Machine Company, Inc.*, 441 F.2d 532 (1971). Thus such an inconsistent verdict is another bare minimum, under due process, to support the conviction.

In accordance with today's fad, Harold Dean Martin, patently guilty, escapes conviction by pointing his finger at the Defendant. His testimony was contradicted, and if true, could have been corroborated but was not, and the jury had some doubt by returning an inconsistent verdict. The sum total of these bare minimums does not add to a fair trial within the meaning of the due process clause of the Fifth Amendment to the Constitution of the United States.

In recent years the Courts of Appeals have adopted

the standard of the "totality of the evidence" in concluding that there was no denial of due process. *United States vs. Lipowitz*, 407 F.2d 597, 599 (1969). The Petitioner believes that this Court should declare that the "totality of bare minimums is a denial of due process."

Thus this case presents an important federal question which should be reviewed and settled under the Fifth Amendment.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted.

RICE & VANSTONE
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Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that service of three (3) copies each of the Petition for Certiorari hereinabove set forth were served by mail this 16th day of May, 1975, upon the Solicitor General, Department of Justice, Washington, D.C. 20530 and upon the Honorable Henry A. Schwarz, United States Attorney for the Eastern District of Illinois, 750 Missouri Avenue, East St. Louis, Illinois, the last mentioned service having been by Air Mail, and both mailings were with postage prepaid.

By: Jack N. Vanstone
Attorney for Petitioner

APPENDIX

I. Applicable Constitutional Provision.

(1) The Fifth Amendment to the Constitution of the United States Provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

II. Opinion of the Court of Appeals Sought To Be Reviewed:

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 74-1993

United States of America,
Plaintiff-Appellee,

vs.

Carl L. Harvey,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois
Benton Division

April 11, 1975

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Philip W. Tone, Circuit Judge

ORDER

After having carefully read the briefs and heard the argument of counsel for appellant, we conclude, as announced at the close of oral argument, that appellant's contentions — that the evidence to support the jury verdict was insufficient because the accomplice's testimony was not adequately corroborated, that the government failed to produce or explain the absence of certain evidence, and that the jury's verdict was inconsistent — do not, whether viewed individually or cumulatively, warrant the reversal of the judgment of conviction entered by the district court. The judgment is, therefore, affirmed.

III. Orders of the Court of Appeals Denying Petition For Rehearing:

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 25, 1975

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Philip W. Tone, Circuit Judge

No. 74-1993

United States of America,
Plaintiff-Appellee,

vs.

Carl L. Harvey
Defendant-Appellant.

Appeal from the United States
District Court for the Eastern
District of Illinois
Benton Division

On consideration of the Petition for Rehearing filed in the above-entitled case,

IT IS HEREBY ORDERED that the Petition for Rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

Supreme Court, U. S.
FILED
JUL 14 1975
MICHAEL RODAK, JR., CLERK

No. 74-1449

In the Supreme Court of the United States

OCTOBER TERM, 1975

CARL L. HARVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1449

CARL L. HARVEY, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied due process because the evidence at trial was only "the bare minimum" necessary to support his conviction (Pet. 2).

After a jury trial in the United States District Court for the Eastern District of Illinois, petitioner was convicted of having received, stored, or disposed of stolen property that was a part of interstate commerce, in violation of 18 U.S.C. 2 and 2315 (Count I), and of having received, stored, or disposed of a stolen shotgun that was moving in interstate commerce, in violation of 18 U.S.C. 2 and 922(j) (Count IV).[1] He was sentenced

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[1]Count II of the indictment was severed prior to trial. Co-defendant Marcus Crawford pleaded guilty to having conspired to sell or receive stolen property that was moving in interstate commerce, in violation of 18 U.S.C. 371 and 2315, and was placed on four years' probation. Petitioner was acquitted on that charge (Count V). He was also acquitted on Count III, which charged the interstate transportation of a stolen revolver, in violation of 18 U.S.C. 922(i).

to four years' imprisonment on Count I, to be followed by four years' probation on Count IV. The court of appeals affirmed summarily (Pet. App. 1a-2a).

The evidence showed that on March 2, 1973, a number of guns, valued in excess of $5,000, were taken during a burglary from a store in Mt. Carmel, Illinois. According to the testimony of Harold Martin, petitioner asked him in early March to locate a buyer for a number of guns (Tr. 44, 48). Martin arranged to sell the guns to co-defendant Crawford. Petitioner advised Martin that these guns had been burglarized from a store in Mt. Carmel, Illinois (Tr. 48-49).[2] On March 10, 1973, petitioner and Martin drove from Illinois to Indiana to pick up the guns. After they obtained the guns, the two men returned to Illinois.[3] Martin retained three of the guns and sold the remainder to Crawford in exchange for an automobile and $2,000.[4] Martin later gave $1,800 of this amount to petitioner (Tr. 71).

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[2]Petitioner also told Martin that the weapons had been hauled by a rope through a hole in the store roof (Tr. 48-49). Other evidence established that the burglary had been accomplished by drilling a hole through the roof of the store (Tr. 14-15).

[3]Martin testified that the guns were located at a farm near Griffin, Indiana, and that when they obtained them petitioner gave the farm's owner a check for $50 (Tr. 49-51).

[4]These guns were identified as those stolen from the Mt. Carmel store (Tr. 28, 54, 88-89, 101-103, 108-112).

According to the testimony of Danny Dennis, petitioner subsequently informed him that the guns had been sold to Martin and Crawford (Tr. 35).[5] Co-defendant Crawford testified and corroborated Martin's testimony that he had purchased the stolen guns from Martin (Tr. 87-96).

Petitioner apparently acknowledges that the evidence was sufficient to sustain his conviction. His contention appears to be that it was so barely sufficient in several respects that he was denied due process. The contention is insubstantial.

1. Petitioner suggests that the evidence was barely sufficient because his conviction rested upon the uncorroborated testimony of an accomplice. While the uncorroborated testimony of an accomplice is, as petitioner concedes (Pet. 4), sufficient to sustain a conviction, it is clear that critical aspects of Martin's testimony were corroborated. The testimony of Danny Dennis also implicated petitioner. Dennis testified that petitioner told him that he could arrange a sale of stolen guns that were then in Indiana but that had been stolen in Mt. Carmel, Illinois. Petitioner later told Dennis that these guns had been sold to Martin and Crawford. Moreover, Crawford corroborated Martin's testimony that Crawford purchased the stolen guns from Martin.

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[5]Petitioner had earlier told Dennis that he could arrange a sale of 30 guns. Petitioner also told him that the guns had been stolen in Mt. Carmel, Illinois, but were then in Indiana (Tr. 32-37, 41).

2. Petitioner also argues that, since the government did not present certain evidence, it can be inferred that this evidence would have been unfavorable to the government. The government did not call as a witness the man who, according to Martin's testimony (see note 3, *supra*), had stored the stolen guns in Griffin, Indiana, and the government did not introduce into evidence the $50 check that petitioner gave the man when he and Martin picked up the guns. Having produced sufficient evidence on all elements of the offense, the government was not required, as petitioner concedes (Pet. 5), to produce additional evidence. *United States* v. *Rizzo*, 416 F.2d 734, 736 (C.A. 7). Moreover, petitioner's attorney, in his closing argument, invited the jury to draw the inference that if the government had presented this additional evidence it would have been unfavorable to the government's case (Tr. of Oct. 8, 1974, p. 16).

3. Finally, petitioner contends that the verdicts were inconsistent and that the inconsistency reflects the jury's doubts about the sufficiency of the evidence. Petitioner was convicted of having received, stored, or disposed of stolen property that was a part of interstate commerce, in violation of 18 U.S.C. 2 and 2315; he was also convicted of having received, stored, or disposed of a stolen shotgun that was moving in interstate commerce, in violation of 18 U.S.C. 2 and 922(j). He was acquitted of having transported in interstate commerce a stolen revolver, in violation of 18 U.S.C. 922(i); he was also acquitted on the conspiracy count. As petitioner concedes (Pet. 4-5), consistency in verdicts is not required. *Hamling* v. *United States*, 418 U.S. 87, 100-101. But the verdicts here were in any event not inconsistent. The counts on which petitioner was acquitted required additional proof of a conspiracy and of petitioner's interstate transportation of a specific revolver.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.